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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-97

ALLIED CHEMICAL CORPORATION,
Petitioner,

vs.

ANTHONY WHITE and HENRY CLARK, SR.,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Dated: September 8, 1977

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Counsel for Respondents.

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QUESTION PRESENTED.

Whether an employee aggrieved by discriminatory employment practices made unlawful by Title VII of the Civil Rights Act of 1964 has a right to a hearing to set aside his assent to an Equal Employment Opportunity Commission Conciliation Agreement on the grounds that the assent was not made voluntarily.

ARGUMENT

A. The Decision of the Court of Appeals Is Clearly Correct.

In its decision, the Court of Appeals held that the District Court should have conducted a hearing into whether the prospective intervenors had knowingly waived their right to sue under Title VII, relying upon this Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), where it was held that in the face of a claim of waiver of the right to sue under Title VII, "a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." Alexander v. Gardner-Denver Co., supra, 415 U.S. at 52 n.15. That statement is a reflection of this Court's consistent position down through the years on the question of waiver, i.e., that a valid waiver must be "an intentional relinquishment or abandonment of a known right or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); see also Gardner v. Florida, 97 S.Ct. 1197, 1206-07 (1977); Barker v. Wingo, 412 U.S. 218, 235-37 (1973); Fay v. Noia, 372 U.S. 391, 439 (1963). The intervenors should be given a chance to show that their assent to the conciliation agreement was not made knowingly or intentionally. Cf. Glus v. Brooklyn Eastern District Terminal, 359 U.S. 231 (1959).

B. This Case Is Not Ripe for Certiorari.

The present posture of this case is a classic example of an interlocutory appeal. The only issue resolved by the Court of Appeals is whether the intervenors are entitled to a hearing on the voluntariness of their assent to the conciliation agreement.

The Court of Appeals did not lay down any guidelines as to the applicable legal standard to be followed, or what would be the contours of the burden of proof; it merely decided that respondents should be given a hearing on the voluntariness question. The case has been remanded for further proceedings along that line, and in similar instances, this Court has declined to grant certiorari because of unresolved factual issues. See, e.g., Brotherhood of Locomotive Firemen v. Bangor & Arostook R.R., 389 U.S. 327, 328 (1967); American Construction Co. v. Jacksonville, Tampa & Key West Ry., 148 U.S. 372, 384 (1893).

The possibility for these potential issues to develop as this case goes along does not make it proper for petitioner to seek an advisory opinion from this Court as to what its position would be on these questions. See, e.g., Kremens v. Bartley, 97 S.Ct. 1709, 1717-19 (1977). Despite petitioner's hyperbole as to the consequences of the decision of the Court of Appeals, if upon remand the District Court finds that there has not in fact been a waiver of Title VII rights, petitioner would have no injury to complain about, and it would be the turn of respondents to have recourse to the appellate courts as to the correctness of the legal standard applied. In the present posture of the case, however, there is only the failure of the District Court to hold a hearing on the waiver, and although petitioner strenuously argues in its petition that the Court of Appeals did not indulge in the presumption of administrative regularity, nor did it take adequate notice of the complex nature of most conciliation

agreements, Petition for Certiorari, pp. 8, 11, passim, none of these issues were the subject of independent consideration by the courts below, and thus cannot be raised here. Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District, 429 U.S. 651, 652-53 (1977); Electrical Workers Local 790 v. Robbins & Myers, Inc., 429 U.S. 229, 235 n. 7 (1976). Petitioner cannot frame any questions in its petition which were not in fact presented in the record below. See, e.g., Belcher v. Stengel, 429 U.S. 118, 119-20 (1976).

The same holds true for petitioner's contention that no right-to-sue notice was issued to the prospective intervenors, White and Clark. There is nothing in the record below to support such an asseveration, and petitioner cannot be allowed to bring it up at this late stage in the game. See, e.g., Youakim v. Miller, 425 U.S. 231, 235-36 (1976); Shadwick v. City of Tampa, 407 U.S. 345, 352 (1972). Even assuming, arguendo, that notice of the right to sue had been issued, the intervenors also sue under 42 U.S.C. §1981, which certainly is not covered under the terms of the waiver set out in the conciliation agreement, see Petition for Certiorari, p. 3, since the waiver covers only rights suable under Title VII, whose remedies and procedures are discrete from § 1981. Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975).

CONCLUSION

For the above and foregoing reasons, respondents respectfully request this Court to deny petitioner's petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

September 8, 1977

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